IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1201 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

HON'BLE SMT.JUSTICE ABHILASHA KUMARI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

STATE OF GUJARAT - Appellant
Versus
LIRIBEN MAKAN SAMANT KUCHNHADIYA & 1 - Respondents

==========

Appearance :
MR KC SHAH, ADDL.PUBLIC PROSECUTOR for Appellant
None for the Respondent

==========

CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 06/08/2007

ORAL JUDGMENT (Per: HONOURABLE MR.JUSTICE J.R.VORA)

1. The above referred Criminal Appeal is

preferred under Section 378 of the Code of Criminal Procedure against the judgment and order dated 20th September, 2004, delivered by the learned Additional Sessions Judge, 8th Fast Track Court at Porbandar in Sessions Case No.15 of 2003, whereby, the present respondents, being accused of the Sessions Case, came to be acquitted by the trial Court for offences punishable under Sections 498A, 323, 306 and 114 of the Indian Penal Code as well as for offence punishable under Section 135 of the Bombay Police Act.

2. According to prosecution case, the deceased of the incident is one Liluben alias Jiviben, wife of Virambhai Makanbhai Kuchadia. She had married to Virambhai before about seven years of the incident. The respondent No.1 – Liriben Makanbhai Kuchadia was her mother-in-law while the respondent No.2 – Parbatbhai Makanbhai Kuchadia happened to be the younger brother of her husband. According to prosecution case, during her married life,

she was treated with cruelty by the respondents and allegations were made against her by respondents about her character as well. On 12th July, 2002, at about 3:00 p.m., in the Sim of village Kuchadi, both the respondents abused the deceased – Liluben and inflicted injuries by stick. On account of this, on 14th July, 2002, at 9:00 a.m., she poured kerosene on her body at her house at village Kuchadi and set herself ablaze. She was thereafter admitted to Government Hospital at Porbandar and she gave her complaint before PSI, Kamalbaug Police Station and the same was registered at Kamlabaug Police Station vide zero number and thereafter it was forwarded to Bagvadar Police Station where crime came to be registered as I-C.R.No.90/2002. The investigation was handed over to PSI Mr.V.N.Chauhan and thereafter to Dy.S.P. Shri Mothalia and from him to Mr.Rameshbhai Fulabhai Sanghala. Ultimately, chargesheet came to be filed against the respondents in

the Court of Judicial Magistrate, First Class at Porbandar which was registered as Criminal Case No.6700 of 2002 and the said case came to be committed to the Court of Sessions where it was registered as Sessions Case No.15/2003.

3. The learned Additional Sessions Judge, 8th Fast Track Court, Porbandar, framed Charge against both the respondents vide Ex.5 on 6th January 2004, to which both the respondents pleaded “not guilty”. The prosecution therefore examined as many as sixteen witnesses and produced on record, voluminous documentary evidence to prove its case. Thereafter, the learned trial Judge recorded the statements of the respondents under Section 313 of the Criminal Procedure Code wherein the respondent No.1, after denying the evidence of the prosecution, further stated that Virambhai (husband of the deceased) and deceased were staying separately from them and away from their

house before three years from date of the incident and he and respondent No.2 had not committed any cruelty upon the deceased. On the contrary, as soon as they came to know about the incident, the deceased was taken to hospital immediately and her parents were called. She was wholly burnt and was not in a position to speak. From the said marriage, the deceased had two children and they were with them and they were taking proper care of the two minor children of the deceased.

4. After hearing the learned Additional Public Prosecutor as well as learned advocate for the defence, the learned trial Judge came to the conclusion to acquit both the accused for offences punishable under Sections 498A, 323, 306 and 114 of the Indian Penal Code as well as for offence punishable under Section 135 of the Bombay Police Act and hence this Appeal by the State.

5. Learned Additional Public Prosecutor Mr.K.C.Shah on behalf of the State, at this

juncture, vehemently urged that the Appeal requires consideration because though effective witnesses have not supported the prosecution case, the Dying Declaration given by the deceased is sufficient evidence to connect the accused with the crime. It is submitted that the evidence of PW-12 Rambhai Jagmalbhai Maru, Executive Magistrate, who recorded the Dying Declaration Ex.58 is above board and it cannot be believed for a moment that he would have manipulated the said Dying Declaration wherein, before him, the deceased stated that on account of the cruelty of the respondents, she poured kerosene on herself and committed suicide. The learned APP, therefore, submitted that this Appeal requires admission.

6. At this juncture also, we have gone through the vital features of the Appeal and we have considered the evidence recorded and reasonable probabilities arising out of the circumstances of the case. We have called for

the Record and Proceedings from the trial Court and we are equipped and assisted by extra copies of the evidence and documents as supplied by the learned APP. We have, therefore, carefully scrutinized the evidence and each corner of the matter at this stage also.

7. Going through the evidence of PW-1 – Samatbhai Maldebhai examined at Ex.11, the brother of the deceased, it is found that he did not support the prosecution case. PW-2 – Maldebhai Devdasbhai, the father of the deceased Liluben @ Jiviben, examined at Ex.12, PW-3 – Lakhiben wife of Maldebhai Devdas, the mother of the deceased examined at Ex.13, PW-4 – Santokben, the wife of elder brother of the husband of deceased, examined at Ex.14, are all relatives of the deceased, but they have not supported the prosecution case so far as the allegation that both the respondents were executing cruelty upon the deceased is concerned. These witnesses,

particularly, the brother and parents of the deceased further stated that the deceased was wholly burnt and was not in condition to speak anything.

8. Prosecution Witness No.5 – Gigiben Lakhabhai, examined at Ex.15, is the neighbour of the deceased and she states that on commotion being noticed at the house of Virambhai, she went there and witnessed that the deceased was burning but she did not ask anything to the deceased. She has been declared hostile by the prosecution. Likewise, PW-6 – Malde Kanabhai, examined at Ex.16, PW-7 – Ranabhai Samatbhai, Ex.17, are the witnesses who reached at the scene of offence and according to the prosecution case before these witnesses deceased alleged cruelty by respondents and also stated that cause of her suicide was cruelty by respondents. However, none of the witnesses supported prosecution case.

9. Prosecution Witness No.8 – Rajabhai Karabhai,

examined at Ex.18, a member of Taluka Panchayat, stated that Virambhai and his wife deceased Liluben were staying separately from the respondents. He denied to have visited Liluben at hospital and on being declared hostile, he denied that Liluben had made any statement before him. PW-9 - Nagabhai Lakhabhai, examined at Ex.19, is also a witness who reached at the scene of offence when Liluben was burning and this witness is not stating anything against any of the respondents in his cross-examination by the prosecution or in his examination-in-chief. PW-10 – Gigiben, wife of Balubhai, examined at Ex.20, also did not support the prosecution case wherein the prosecution alleged that this witness stated before the police that she reached at the scene of offence where the deceased made a statement that she had poured kerosene and had burnt herself. PW-11 – Dr.Haresh Parshottambhai Chavda, examined at Ex.27, conducted the post-mortem of the dead body of the deceased

and submitted on record post-mortem note at Ex.29. Accordingly, the cause of death was shock due to 100% superficial to deep burns (whole body burns). PW-11 – Jaswantkumar Ramjibhai Mothaliya, examined at Ex.33, is the investigating officer and he took the charge of investigation from 27th July, 2002. He deposed about the investigation he carried out. In his evidence, it is revealed that PSI of Kamlabaug Police Station had recorded the compliant of deceased Liluben and this witness identified the signature of the said PSI and said complaint, so far as signature of PSI is concerned, was placed on record at Ex.36.

10. Prosecution Witness No.12 – Rambhai Jagmalbhai Maru, examined at Ex.56, was the then Executive Magistrate who recorded the Dying Declaration of the deceased, which is at Ex.58. Accordingly, PW-12 – Rambhai deposed that he received a Yadi Ex.57 on 14th July 2002 to record the Dying Declaration of

deceased Liluben and he reached at Bhavsinhji Hospital, Porbandar at 11:10 a.m. He reached near the deceased and requested the other persons present near the deceased to get out of the room. Thereafter, he started recording Dying Declaration He asked questions as to what was her name, what was the name of her husband, what was her age, where she resided etc. According to this witness, the deceased replied all those questions correctly and properly. On questioning about the marriage and the period of married life, the deceased replied to him that the marriage between her and her husband took place before seven years. To a question that what had happened to her, she stated before this witness that both the respondents meted out cruelty upon her and on account of that she poured kerosene and put her to ablaze. She replied to a question that she was taken to hospital by Maldebhai. According to this witness, he then obtained the thumb impression of the deceased and before that the Dying

Declaration was read over to the deceased. He signed the Dying Declaration in token of the same being recorded in his presence. He completed recording of Dying Declaration at 11:25 a.m. In examination in cross, the witness stated that when he reached near the deceased, her relatives were present near the cot of the deceased. He did inquire who were the relatives but did not record the same. The doctor was in OPD room at that time and when Dying Declaration was completed, the witness went to the chamber of OPD and obtained signature of the doctor in the OPD room. He did not obtain the opinion of the doctor in the Dying Declaration regarding condition of the patient. He further stated that from the Yadi he received and placed on record at Ex.57, he gathered that the patient was serious. He did ask the question about physical condition of the deceased but did not record such question or answer in the Dying Declaration. He admitted that he did not record in the Dying Declaration that the

physical condition of the deceased was satisfactory as to give Dying Declaration. He denied the allegation that the patient was so serious that she was not in a position to understand the question and to offer reply. He denied the allegation that the father of the deceased was present there and he offered the replies which he recorded in Dying Declaration. He denied that he had no authority under law to record the Dying Declaration

11. Prosecution Witness No.12 - Tamuben Bhimabhai Bharwada, examined at Ex.59, was the then Police Station Officer of Bagvadar Police Station and on receiving the complaint from Kamlabaug Police Station, she recorded the complaint and made necessary entries in the Police Station House Register. PW-13 – Rameshbhai Fulabhai Sanghala, examined at Ex.61, is the second investigating officer, who took the charge of investigation from 14th July, 2002, and after investigating the crime

till 27th July, 2002, he entrusted and transferred the investigation to Dy.S.P. Mr.J.R.Mothalia, on account of the transfer of this witness elsewhere. He has been cross-examined by the defence in detail. PW-14 – Virendrasinh Narendrasinh Chauhan, examined at Ex.63, at the relevant juncture was serving as PSI at Bagvadar Police Station and immediately after registering the offence, the investigation was entrusted to him and thereafter, he immediately entrusted the investigation to Dy.S.P. Mr.Rameshbhai Fulabhai Sanghala.

This is in all the evidence of the prosecution in the Sessions Case.

12. The scope of the Appeal against the acquittal is well defined that the appellate Court has enough power to re-appreciate the evidence recorded during the trial and come to its own independent findings but at the same time, it is also a celebrated principle of law that in Appeal against acquittal, unless it is found

that the reasons recorded by the trial Court for the acquittal are perverse, untenable, palpably wrong and demonstrably unsustainable, no interference is permitted in the order of acquittal even if the second view is possible from the appreciation of evidence recorded during the trial.

13. This being Appeal against acquittal, it is necessary to take into consideration the reasons recorded by the trial Court for acquittal. While going through the reasons recorded by the trial Court, it clearly appears that the trial Court did not place reliance on Dying Declaration Ex.58 recorded by PW-12 – Mr.Rambhai Jagmalbhai Maru. The trial Court recorded that all other effective witnesses did not support the prosecution case so far as the allegations against the respondents in respect of cruelty were concerned. The trial Court recorded that according to other witnesses, who happened to be the parents and brother of the deceased

stated that Liluben was completely burnt and was not in a position to speak anything and therefore, according to the trial Court, no reliance can be placed upon Dying Declaration Ex.58, which is the only evidence against the respondents in the circumstances that all other witnesses did not support the prosecution case. Discussing and appreciating this evidence, in paragraph-24 of the judgment and order impugned, the learned trial Judge came to the conclusion that neither the Dying Declaration nor the complaint, stated to have been offered by the deceased before the PSI of Kamlabaug Police Station, inspires any confidence. Taking into consideration the evidence of PW-12 – Mr.Rambhai Jagmalbhai Maru, the learned trial Judge recorded that it could not be ascertained by the Executive Magistrate from the doctor concerned that the deceased was in a fit mental as well as physical condition to give Dying Declaration before the Executive Magistrate. She had 100% burns injuries as

per the post-mortem notes. The learned trial Judge further observed that the concerned PSI, who recorded the complaint Ex.36, could not be examined by the prosecution and therefore, the contents of ex.36 could not be proved. The learned trail Judge further referred the evidence of PW-12 – Mr.Rambhai Jagmalbhai Maru and came to the conclusion that though the Executive Magistrate did ask the deceased about her condition but neither the question which the Executive Magistrate framed nor the answer which he received from the deceased, were recorded by the Executive Magistrate in the Dying Declaration. According to the trial Court, it was difficult to believe that the deceased was in a fit mental condition to offer Dying Declaration at the relevant juncture. According to the trial Court, the evidence of the prosecution regarding obtaining the opinion of the concerned doctor about the physical condition of the deceased is ambiguous and not free from doubt and for

this reason, the trial Court acquitted both the accused.

14. While re-appreciating the evidence and scrutinizing the reasons given by the learned trial Court for the acquittal of the accused, we also find that the reasons recorded by the trial Court for acquittal are plausible and probable and even if second view is possible, it is not permitted to interfere in the order of acquittal. The findings of the trial Court are based upon the evidence recorded. It is recorded in the evidence that the deceased had 100% burns and that though PW-12 – Mr.Rambhai Jagmalbhai Maru recorded the Dying Declaration, no evidence could be led by prosecution to satisfy the test that the deceased was in a fit mental and physical condition to offer the Dying Declaration. PW-12 – Mr.Rambhai Jagmalbhai Maru stated to the extent that he obtained signature of the doctor in the chamber of OPD Room when Dying Declaration was over. Though according to PW-

12 – Mr.Rambhai Jagmalbhai Maru, he asked certain questions to the deceased and the deceased properly replied to him, this fact itself is not sufficient to inspire confidence of the Court that the deceased was in a fit mental and physical condition to give Dying Declaration. When the whole case rested only on the evidence of Dying Declaration, and when as aforesaid, the Dying Declaration could not pass the test of credibility and reliability, by no stretch of reasoning it could be said that the findings arrived at by the trial Court are perverse, palpably wrong or unsustainable. We, therefore, do not find the judgment and order impugned in this Appeal exceptionable and hence, the following order.

15. Leave to Appeal refused. The Appeal stands dismissed.

(J.R.Vora, J.)

(Smt.Abhilasha Kumari, J.)

(sunil)